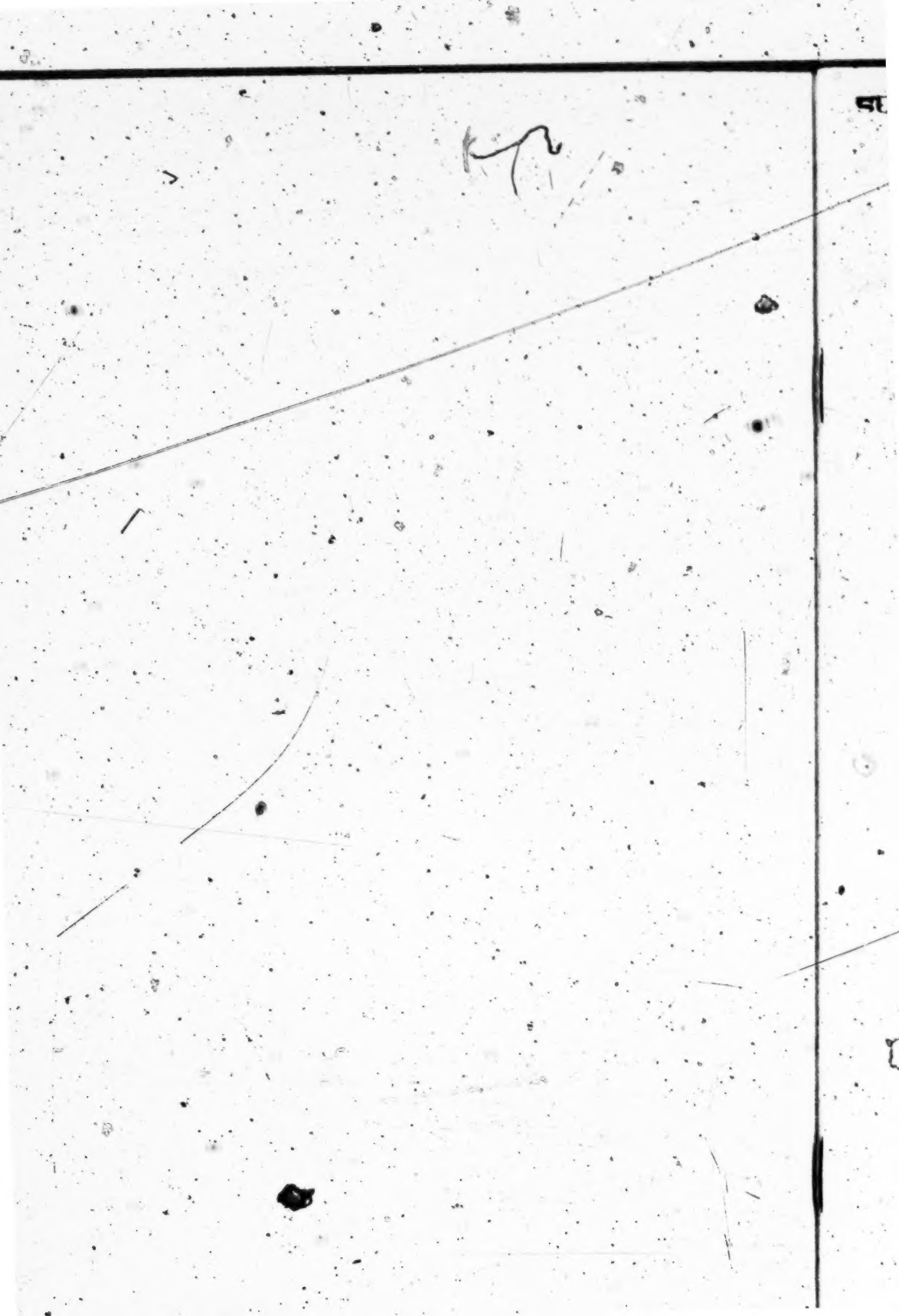

REME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,
Intervenor-Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company,
Intervenor-Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,
Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,
Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Intervenor-Appellee pro se
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IN THE

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OCTOBER TERM, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,

Intervenor-Plaintiffs-Appellants,

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Intervenor-Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY ATTORNEY GENERAL OF THE STATE OF NEW YORK

Intervenor-appellee, Louis J. Lefkowitz, Attorney General of the State of New York, moves pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United

States, that the judgment of the United States District Court for the Southern District of New York be affirmed or, in the alternative, that this appeal be dismissed.

Opinion Below

The opinion of the Court below is not yet reported. It is reproduced as Appendix A to appellants' jurisdictional statement.

Jurisdiction

Appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1253.

Statute Involved

New York State General Municipal Law, § 103-b (Appellants' Appendix B).

Questions Presented

1. Did the District Court improperly abstain from deciding the constitutional question presented in view of the patent necessity for State construction of the statute and appellants' insistence that the sanction of the statute was not available because State authorities did not comply with the statute?

2. Does the instant appeal present a justiciable controversy within the jurisdiction of this Court?

3. Does the question of the constitutionality of the statute raise a substantial federal question requiring a full hearing before this Court?

Statement

Appellants appeal directly from an order of a three-judge statutory court of the United States District Court for the Southern District of New York abstaining from deciding whether or not New York General Municipal Law § 103-b is consitutional. That statute provides in substance that, when a person called before a Grand Jury to testify concerning any transaction or contract had with the State or any of its political subdivisions "refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract", he and any corporation of which he is a director or officer shall be "disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof . . . for a period of five years after such refusal or until a disqualification shall be removed . . ."*

In their complaint, the appellants alleged that each is an officer of a named milk dealer "which engages, or may engage in any transaction or has or may obtain a contract or award or has submitted a bid for milk or dairy goods, work or services with the State of New York, any municipal corporation or fire district therein, any public authority therein or any public department, agency or official thereof" (Complt. ¶ 2).

Each appellant alleged that he was called by the District Attorney of New York County before the Grand Jury, that he refused to sign a waiver of immunity as specified in the statute and that, in consequence, the District Attor-

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* Although not directly involved in the instant case, New York Public Authorities Law § 2602 and State Finance Law § 139-b contain similar provisions.

ney was planning to send or had sent "a notice pursuant to the applicable statutes to the Superintendent of Public Works in the State of New York of the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom plaintiffs by the corporations and firms of which they are officers or directors, are known to have contracts" (Complt. ¶14) and that, in fact, the City's Purchase Director has "refused to recognize bids submitted by Queensboro Farm Products, Inc." (Complt. ¶14-a). Appellants did not allege that any action had been taken or was threatened against them as individuals or that any action had been taken pursuant to the applicable statutes. Indeed, they alleged, as a first cause of action, that the rejection of the bids was not authorized by the applicable statutes (Complt. ¶14-A).

Appellants, nevertheless, asserted that the statutes were unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution (Complt. ¶18). Because of this assertion the Attorney General, pursuant to 28 U.S.C. § 2284 and New York Executive Law § 71, intervened as a party defendant.

Milk contracts are awarded by the Department of Purchase on a month to month basis (*id.* at 41), and while the defendant Commissioner of Purchase on March 29, 1967 did disregard low bids by Queensboro Farm Products and Weissglass Gold Seal Dairy Corp. on three items, those two corporations were not declared to be disqualified from doing business with the City of New York. In fact, they were invited by the City to submit bids on the next month's milk contracts (*id.* at 40-41).

The City of New York has moved to set up procedures whereby the disqualification provisions of § 103-b of the General Municipal Law will not operate automatically with respect to City contracts. The City informed the District Court that none of the persons or corporations listed

in the notices of refusal which had been received as of the date the procedure was established was to be disqualified from receiving City contracts for five years automatically upon receipt of such notice of refusal (*id.* at 48). All such persons listed would be accorded a hearing and given an opportunity to explain the refusal to waive immunity or to answer a question before the Grand Jury investigating public contracts. In the event that any such persons or corporations were low bidders of a City contract, a meeting of the Board of Responsibility would be convened to pass upon the responsibility of the bidder. The Board of Responsibility consists of the Comptroller, the Corporation Counsel and the head of the agency making the award or their authorized representatives (*id.* at 47).

This proceeding was initiated by appellants suing in their individual capacities. Their corporations were not joined as parties plaintiff. However, at no time were any of the appellants licensed to engage in the milk business, none of them personally conducted such a business and none of them had any milk contract with the City or State of New York (*id.* at 43-44).

The three-judge Court abstained from assuming jurisdiction and did not pass on the merits on the constitutional questions presented. The Court, after reviewing the facts in the complaint and the contentions of the parties, concluded that "the uncertain and shifting factual and legal background of the present action requires us to abstain from passing judgment on the merits of plaintiffs' motions" (*id.* at 54), finding that this is "a classic case for invoking the doctrine . . ." (*id.* at 58). It concluded that recent cases particularly *Spevack* v. *Klein*, 385 U. S. 511 and *Garrity* v. *State of New Jersey*, 385 U. S. 493, had raised significant questions with respect to the constitutionality of § 103-b. The Court viewed the issue as one of competing interests between the doctrine of self-incrimination and the "demonstrated need to protect the public fisc against theft through collusive bidding on pub-

lic contracts and the manifest desirability of awarding public contracts only to those possessing certain minimal qualifications of moral worth and responsibility . . ." (*id.* at 59-60). The Court held that while significant state policies could not by themselves validate the means chosen to effectuate those policies, it was necessary for the Court to know how the statutes in question were to be construed (*id.* at 60). The Court then held that in view of the pending cases of *Gardner* v. *Broderick* and *Matter of Campbell* v. *Reid*, at that time before the New York Court of Appeals, it was not clear whether or not the statutes would be automatically applied. Moreover, the Court pointed out that a hearing procedure was being set up by the City of New York. The Court also found that there were ample procedures in the state courts to test the claim being raised (*id.* at 63-64).

The Court apparently rejected the contention of appellees that the appellants had no standing to raise the question since they were suing as individuals but only their corporations were affected by the disqualification procedures (*id.* at 64-65). The Court in sum held:

> "Substantial constitutional questions have been posed concerning the validity of presently uncertain state law; governmental action based on that state law affecting the plaintiffs here is far from final; ample and effective means appear to be available to challenge that action in the state courts when it becomes final and perhaps earlier; and, lastly, the claimed violations of federal constitutional rights can be raised in the state court proceedings or, if necessary, upon ultimate review by the United States Supreme Court." (*Id.* at 65-66)

REASONS FOR GRANTING THE MOTION TO DISMISS OR AFFIRM

I

There is no substantial basis for challenging the disposition by the District Court abstaining from deciding the merits of appellants' claim.

Appellants claim that the decision of the District Court, has been rendered inappropriate by the subsequent decisions of the New York Court of Appeals in *Gardner* v. *Broderick*, 20 N. Y. 2d 227, 229 N. E. 2d 184, appeal pending No. 635, Oct. T. 1967, and *George Campbell Painting Co.* v. *Reid*, 20 N. Y. 2d 370, 229 N. E. 2d 602, appeal pending No. 673, Oct. T. 1967. *Gardner* v. *Broderick*, *supra*, arising under § 1123 of the New York City Charter, involves the case of a New York City policeman who refused to sign a waiver of immunity to testify before the Grand Jury and was dismissed after an administrative hearing. The Court of Appeals held that it was not unconstitutional to require the waiver of immunity and to discharge a public employee who refused to sign such a waiver.

In *George Campbell Painting Co.* v. *Reid*, *supra*, arising under Public Authorities Law § 2601, the appellant corporation was disqualified from bidding on contracts to be awarded by the New York City Housing Authority because the person who was president of the corporation at the time certain contracts under investigation by the Grand Jury had been negotiated refused to sign a waiver of immunity when called before the Grand Jury. The Court, relying on *Gardner* v. *Broderick*, *supra*, held the disqualification to be valid. The Court said, however, that:

> "There may be times when the statute will operate to penalize a corporation which has severed its connection with the recalcitrant officer and which has otherwise been cooperative. The legislature has, however,

recognized this problem and has specified a procedure by which the disqualification can be removed under such circumstances (Public Authorities Law § 2603). The appellants' exclusive remedy is the procedure outlined in that statute."

The *Gardner* and *Campbell* decisions construe statutes which are virtually the same as General Municipal Law § 103-b. The United States Court of Appeals for the Second Circuit has held that, in view of those two decisions, there is no basis for federal abstention on the issue of dismissal for refusal to sign a waiver of immunity. *Uniformed Sanitation Men Association, Inc., et al.* v. *Commissioner of Sanitation, et al.*, —— F. 2d —— (2d Cir. Sept. 20, 1967), Sl. Sh. Op. p. 3401.

In spite of these three decisions, abstention was not improper in the instant case. As the District Court pointed out, not only the legal but the factual situation was unclear (Op. of the District Ct., Jurisd. Statement p. 54). While the Court of Appeals may be read to have construed the statutes under attack as operating automatically, the affirmance by that Court of the *Gardner* case indicates that it was not improper to hold an administrative hearing. The City has undertaken to hold such hearings to determine whether the disqualification provisions should be involved. Unless one accepts appellants' astounding argument that, even as public contractors, they may never be required to answer questions with respect to those contracts (See Juris. Statement, pp. 24-25), then it is clear that the nature of any constitutional questions would be different after a hearing than before one. See *Thorpe* v. *Housing Authority*, 386 U. S. 670; *Slochower* v. *Board of Higher Education*, 350 U. S. 551; *Spevack* v. *Klein*, 385 U. S. 511. For that reason, the decision of the District Court to abstain was proper. *Baggett* v. *Bullitt*, 377 U. S. 360.

Furthermore, appellants persist in their claim raised before the District Court that the District Attorney im-

properly applied § 103-b when he demanded a general, rather than a limited, waiver of immunity and that, in consequence, the sanction of such statute is not available. This is a threshold question of state law which, if resolved in favor of appellants, would obviously remove the occasion for any question of the constitutionality of § 103-b since any action taken would not be pursuant to the statute.

Appellants' argument that civil rights claims are never subject to the abstention doctrine is obviously incorrect. *Monroe* v. *Pape*, 365 U. S. 167, relied on by appellants, holds that exhaustion of state remedies is not required in civil rights actions. It does not deal with the question of abstention. Inapposite for the same reason are *McNeese* v. *Board of Education*, 372 U. S. 668 and *Stapleton* v. *Mitchell*, 60 F. Supp. 51 (D. Kan.).

Appellants' claim of irreparable injury finds no support in the record. The claim that "presumptively" the corporations with which they are associated are precluded from entering into any contract and that they have lost chances to bid on "the multitudes of contracts" available must be considered in light of the facts that if such corporations were low bidders on any of those contracts, such corporations have had available to them the Board of Responsibility procedure indicated by the City in the District Court.

Moreover, the appellants did not return to the District Court after the decisions by the New York Court of Appeals in *Campbell* and *Gardner* or make any other judicial application available to them.

II

The instant case does not present a justiciable controversy within the jurisdiction of this Court.

The appellants in this case sued as individuals and not on behalf of the corporations of which they are officers. They alleged that their individual privilege against self-

incrimination was violated by the threat that corporations with which they were associated would be disqualified from obtaining milk contracts if they did not sign waivers of immunity. It is clear that if appellants were to present an arguable claim that their privilege against self-incrimination has been violated, it would be requisite for them to establish either that improperly obtained testimony was used against them in criminal proceedings or that they, as individuals, have suffered a civil sanction solely because of their invocation of the privilege. In the instant case, concededly, not one of the appellants waived immunity, not one of them testified, and not one of them was indicted as a result of any such testimony being used against him. Contrast *Garrity* v. *New Jersey*, 385 U. S. 493.

Nor is there any arguable claim that they have suffered the imposition of a sanction as a result of their claim of such privilege. First, none of the appellants, as individuals, or as milk dealers, were licensed to sell milk as required by New York Agriculture and Markets Law § 257 and New York City Health Code, Article 3, § 111.05. It is axiomatic that one who is not directly aggrieved by the operation of the statute may not challenge its validity in a federal court. *McGowan* v. *Maryland*, 366 U. S. 420, 429-30; *United States* v. *Raines*, 362 U. S. 17, 20-24; *Tileston* v. *Ullman*, 318 U. S. 44. Here the only possible consequences of the refusal of appellants to sign the requested waivers of immunity are the civil sanctions to the corporations. Since there are no sanctions against the individual plaintiffs, it is untenable for such appellants as individuals to claim the standing to challenge the operation of the statute. *Poe* v. *Ullman*, 367 U. S. 497, 503-505.

Appellants' novel claim to meet this indispensable requirement is that they are substantial stockholders of the corporate licensees and may suffer some consequences of any possible disqualification of those corporate licensees. However, the allegation of speculatively indirect economic

detriment does not justify the action by the individual stockholders. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 122, 151. Even if each appellant owned all of the stock of the corporation, by electing to do business as a corporation he established a separate entity with its own rights, duties and liabilities. The corporation is neither responsible for its officers' or stockholders' individual liabilities, nor is it the beneficiary of their individual rights. *Noble* v. *C.I.R.*, 368 F. 2d 439, 445 (9th Cir. 1966); *In re Gibraltar Amusements Ltd.*, 291 F. 2d 22 (2d Cir.), *cert. den.* 368 U. S. 925; *Lagow* v. *United States*, 159 F. 2d 245 (2d Cir.). Appellants' claim that they are virtually unemployable certainly is not a result of the statute. The statute is directed only at officers or directors of corporations, it does not even apply to stockholders, let alone mere employees. And, of course, appellants are not, in fact, unemployed.

Peculiarly, the licensed milk dealer corporations were not made parties in this case. The complaint did not allege that it was a violation of due process of law to disqualify such corporations from obtaining city contracts because of any officers' refusal to sign a waiver of immunity. Moreover, appellants still insist that they are not seeking to raise any claim on behalf of the corporations. It is obvious, indeed, that the corporations could not assert a claim of violation of the privilege against self-incrimination since they do not have a privilege of their own and since they cannot assert that privilege on behalf of anyone else. *United States* v. *White*, 344 U. S. 694.

The individual appellants cannot claim a violation of their privilege against self-incrimination by virtue of the imposition of a sanction on another entity, that is, the corporation. They cannot circumvent the fact that any impact results on the corporation by claiming the derivative impact of that sanction. Any claim of violation of the

privilege depends on there being an identity between the person with the privilege and the person on whom any penalty is imposed. Absent such identity, no violation could be asserted.

III

The appeal fails to raise a substantial federal question.

Even if, *arguendo,* appellants could assert that their privilege against self-incrimination is violated by their refusal to waive immunity, it is clear that any disqualification results only from a lack of candor on their part. The position of appellants basically, is that they may never under any circumstances, in any form, be called upon to give an account of themselves with respect to public contracts. The Second Circuit in *Uniformed Sanitation Men, et al.* v. *Commissioner of Sanitation, supra,* has accurately analyzed the situation:

> "It was surely proper for a City official charged with a duty to do so to investigate charges of misfeasance in the operation of the Sanitation Department and in connection with such an investigation to question employees about their participation in activity which reflected the possibility of bribery and embezzlement. Can there be any reasonable doubt that an employee, especially one who has been warned of the consequence of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?"

The District Court itself strongly stated the interest of the State (Jurisd. Statement pp. 59-60). The New York Court of Appeals in *Gardner* v. *Broderick, supra* and *Campbell* v. *Reid, supra* has reached the same conclusion. See also *United States ex rel. Laino* v. *Warden,* 246 F. Supp. 72 (S.D.N.Y.), *aff'd* 355 F. 2d 208 (2d Cir.).

The State has affirmatively dictated that it is of the highest importance that there be no collusive bidding or

bid rigging in any transactions involving public contracts. This the State has done by stipulating that in every public contract proper assurances be incorporated by the private contracting party to that effect (See e.g. General Municipal Law § 103-d). The New York statute is substantially identical with federal requirements. See 41 C.F.R. § 1-1, 317 (1965) (Federal Procurment Regulations).

In approving Section 103-b, Governor Rockefeller pointed out that:

> "Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public. Likewise, it would seem appropriate that public contracts should provide that the benefit accruing under them be available only so long as the beneficiary is willing, when required by a grand jury to disclose any information he may have as to a public contract." *Memorandum of the Governor*, N. Y. STATE LEGISLATIVE ANNUAL (1959), p. 431.

The provisions here challenged are in no respect arbitrary. They do no more than seek to insure candor on the part of public contractors and the protection of the public from persons or corporations that feel they cannot be candid in their public dealings. There can be no question but that public bodies are entitled to such candor even absent a statutory provision. *United States ex rel. Laino* v. *Warden, supra,* at 93. This has repeatedly been held to be the case with public employees. *Nelson* v. *County of Los Angeles,* 362 U. S. 1; *Beilan* v. *Board of Public Education,* 357 U. S. 399; *Lerner* v. *Casey,* 357 U. S. 468; *Slochower* v. *Board of Higher Education,* 350 U. S. 551. The rationale which requires candor on the part of public

employees applies equally at least to public contractors. *United States ex rel. Laino* v. *Warden, supra,* at 94.

No decision of this Court has undermined the validity of the state procedures for insuring non-collusive bidding and honest performance of duties and contracts. As the Second Circuit pointed out, *Garrity* v. *New Jersey* is inapposite because no testimony was used in a criminal proceeding. See also *Gardner* v. *Broderick, supra.* This Court has already held that testimony obtained from a witness under threat of loss of employment is inadmissible in a criminal proceeding. There is no basis for finding that the sanction of job (or contract) loss must be an empty one. The only way the state can protect itself against contractors who will not be frank about their business with the state or its agencies is not to do business with them.

Nor can appellants find any support in *Spevack* v. *Klein,* 385 U. S. 511. Their reliance upon it is overbroad. That case involved neither a public employee nor public contractor but a licensed attorney whom the majority appear to have found had a property right in the license. See concurring opinion of Mr. Justice FORTAS (*id.* at 519-20). Accordingly it did not even suggest an overruling of such cases as *Nelson* v. *Los Angeles, supra; Beilan* v. *Board of Public Education, supra* and *Slochower* v. *Board of Higher Education, supra.* The principle enumerated in or of *United Public Workers* v. *Mitchell,* 330 U. S. 75. It decided only that the right to exercise the privilege against self-incrimination could not be withheld from the licensed attorney. It did not preclude the requirement of candor licensed of attorneys with narrow regard to the right of the State to any specific information. But the rights and privileges of licensees of business or professions dealing with the public are a far cry from the exercise of the established function of any governmental body, state or federal, to protect itself from the practices of collusive

bidding which have proved a cancer to the body public where tolerated. Accordingly, there is no property right to a public contract in New York. *Matter of Caristo Construction Corp.* v. *Rubin,* 15 A. D. 2d 561 (2d Dept.), *aff'd* 10 N. Y. 2d 538; *Matter of Zara Contracting Co., Inc.,* 45 Misc. 497 (Sup. Ct. Albany Co.), *aff'd* 23 A. D. 2d 718 (3rd Dept.), *lv. to app. den.* 16 N. Y. 2d 482. The necessity for candor required by the statute is, of course, far more compelling with respect to a public contractor who stands in a special relation to the government. The provision assailed by appellants is unquestionably an indispensible safeguard for the public against any venal conspiracy to defraud the state.

CONCLUSION

For the foregoing reasons the within motion to dismiss or affirm should be granted.

Dated: New York, New York, November 8, 1967.

Respectfully submitted,

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